CHIN SWEE HIN SDN. BHD. v. MOHAMED ARIF BIN KHALID

[A.C.J. (Ibrahim J.) January 24, 1976]
[Muar — Civil Appeal No. 5 of 1973]

Employment — Overtime — Food allowance — Whether for purposes of calculating a labourer's overtime pay his "wages" would include food allowance paid to him — Employment Ordinance, 1955, ss. 2, 25, 29, 60A (5)(a) and 69.

In this case the respondent was first employed by the appellant on February 4, 1971 as an apprentice tyre-man and paid at a daily rate of $2.50, i.e. $1.50 basic wage plus $1.00 food allowance. Subsequently he was confirmed in his appointment and paid at the following monthly rates:—

From 1.5.71 to 31.12.71 @ $45.00 basic wages + $50.00 food allowance.
From 1.1.72 to 31.12.72 @ $55.00 basic wages + $50.00 food allowance.
From 1.1.73 to 15. 1.73 @ $70.00 basic wages + $50.00 food allowance.

As a result of a dispute between the parties regarding overtime pay etc. an enquiry was held by the Labour Officer, Muar under section 69 of the Employment Ordinance. The Labour Officer made an order that for purposes of calculating labourer's overtime pay his "wages" would include the food allowance paid to him. On appeal,

Held: the food allowance had to be included as part of the respondent's wages for purposes of calculating his overtime pay.

CIVIL APPEAL.

F. Keith Sellar for the appellant.

H.L. McLeod as *amicus curiae.*

Ibrahim J.: The respondent was first employed by the appellant on February 4, 1971 as an apprentice tyre-man and paid at a daily rate of $2.50¢, i.e. $1.50¢ basic wages + $1/- food allowance (COLA). He was subsequently confirmed in his appointment and paid at the following monthly rates:—

From 1.5.71 to 31.12.71 @ $45/- basic wages + $50/- food allowance.
From 1.1.72 to 31.12.72 @ $55/- basic wages + $50/- food allowance.
From 1.1.73 to 15. 1.73 @ $70/- basic wages + $50/- food allowance.

There was a dispute between the parties regarding overtime pay etc. and an enquiry was held by the Labour Officer, Muar under section 69 of the Employment Ordinance, No. 38 of 1955, at the conclusion of which he decided as follows:

"I order Chin Swee Hin Sdn. Bhd., No. 52-1, Jalan Sultanah, Batu Pahat to pay to the Penolong Pengarah Hal Ehwal Buruh, Muar on behalf of Mohd. Arif bin Khalid the sum Dollars one hundred and ninety-nine and cents twenty-four ($199.24) being arrears of underpaid overtime pay and balance of wages due to him."

In calculating the overtime pay the appellant had excluded the food allowance from the respondent's wages but the labour officer had included it and the arrears of underpaid overtime pay which the labour officer ordered the appellant to pay was $190.26¢. This is an appeal against that order made by the labour officer and the only ground of appeal is that the labour officer had erred in fact and in law in including the $50/- monthly food allowance as part of the wages of the respondent.

Section 60A(5)(a) of the Employment Ordinance provides that:

"For the purposes of calculating the payment due for overtime to a labourer, such labourer's hourly rate of pay shall be taken to be —

(a) in the case of a person employed on a monthly rate of pay, twelve times his monthly rate of pay divided by fifty-two times forty-eight hours; . . ."

The monthly rate of pay the respondent received from the appellant must be his monthly wages and in section 2(1) "wages" means:

"all remuneration which is payable to a labourer for work done in respect of his *contract of service* but does not include —

(a) the value of any house accommodation or the supply of any food, fuel, light, or water or medical attendance, or of any amenity or services excluded by general or special order of the Minister published in the Gazette;"

(The emphasis is mine.)

and "contract of service" means:

"any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a labourer and that other agrees to serve his employer as a labourer and includes an apprenticeship contract;"

Section 25(1) provides that the entire amount of wages shall be paid to a labourer in legal tender and section 29 provides for remuneration other than wages. Under section 29 an employer could

"provide the labourer with house accommodation, food, fuel, light, water, medical attendance, or any amenity or service in addition to wages. . . ."

There is nothing in the contract of service between the parties in this case under which the appellant had agreed to provide food to the respondent but it is contended by the appellant that the food allowance given to the respondent was the "value of . . . the supply of (any) food" and that had it been the intention of the legislature to include food allowance as wages it would have used the same or similarly unambiguous words used in the definition of wages in section 2 of the Employees Provident Fund Ordinance No. 21 of 1951 which clearly states that it would include "any allowance payable by the employer to the employee in respect, either explicitly or impliedly, of high cost of living" or earnings in section 3 of the Workmen's Compensation Ordinance No. 85 of 1952 which "shall be deemed to include, in addition to his actual money earnings, any privilege or benefit the value of which is capable of being estimated in money . . ."

It appears to me that the words used in the definition of wages in section 2 of the Employment Ordinance are clear and unambiguous and there is therefore no necessity to look at some other Ordinance to discover what the intention of the legislature was. The principal aim of the Ordinance was to protect the labourers from exploitation and it could not therefore be the intention of the legislature that a substantial amount of the remuneration in cash paid to a labourer could be excluded for purposes of calculating overtime pay by just calling it food allowance. To supply is to provide and the value of the supply of food must necessarily be the value of the food which the Appellant had agreed to supply or provide the Respondent with and as there was no such agreement in their contract of service the food allowance paid could not be treated as the value of such supply or provision.

The attention of the court has also been drawn to the C.O.L.A. which was paid to Government employees before the Suffian salary scheme came into force and to the special relief allowance currently paid to Government employees. The advertisements for Government vacancies before Suffian show that the salaries offered included the prevailing rates of cost of living allowance and General Order Cap. H. 9(a) clearly provided that for purposes of calculating overtime pay for monthly rated staff the cost of living allowance was to be included. As the food allowance paid to the respondent by the appellant was part and parcel of the contract of service in this case there is no reason why it should not also be included for purposes of calculating overtime pay. It is significant that in the case of the special relief allowance currently paid to Government employees the Government advertisements for vacancies have not included it as a term of the contract of service and it is therefore not surprising that it is excluded for purposes of calculating overtime pay.

I therefore agree with the labour officer that the food allowance had to be included as part of the respondent's wages for purposes of calculating his overtime pay and in the event I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Keith Sellar, Tennakoon & Pillay.*

DIRECTOR-GENERAL OF INLAND REVENUE v. EE SIM SAI

[O.Cr.J. (Ibrahim J.) March 16, 1976]
[Malacca — Originating Motion No. 6 of 1975]

Income Tax — Undisclosed income — Additional assessment — Whether in assessing a taxpayer's undisclosed income the consideration stated in Form 14A prescribed under the National Land Code is irrebuttable.

Evidence — Form 14A prescribed under National Land Code — Whether irrebuttable — Evidence Act, 1950, ss. 91 and 92.

In this case the appellant sent to the respondent a Notice of Additional Assessment of $21,670.15 for the year of assessment 1970. That sum was assessed after comparing the capital worth of the respondent at the end of 1968 and 1969 as computed by the appellant. In 1969 the respondent and another had bought 14 lots of land which made up a certain housing estate. The consideration stated in the prescribed Form 14A which was presented and registered at the Land Office, Malacca under the National Land Code was $126,472.50 and as the respondent's share in it was 2/3rd the appellant had credited the sum of $84,315 as the respondent's undisclosed income for that year. The respondent disputed that amount and appealed to the Special Commissioners. At the hearing before the Special Commissioners the appellant merely relied on the consideration stated in Form 14A which he alleged was irrebuttable. The Special Commissioners decided otherwise and allowed the respondent to call several witnesses and produce several documents to establish his contention that he and the other person had bought the said land not at $126,472.50 as stated in Form 14A but at $65,000 and that his 2/3rd share of it was $43,500. The Special Commissioners decided that $43,500 was the actual price paid by the respondent and that amount should be taken into account to compute the respondent's capital worth as at December 31, 1969. They accordingly ordered that the Notice of Additional Assessment for the year of assessment 1970 be amended to give effect to their decision.

Held: (1) as Form 14A is dispositive in character, section 92 of the Evidence Act would operate in this case;

(2) on the operation of section 92 other evidence was admissible to rebut the consideration stated in Form 14A as the appellant was a stranger to it;

(3) in any event the court was of the view that the Special Commissioners had exercised their discretion judicially when they admitted the evidence in rebuttal adduced by the respondent;

(4) not only greater mischief but also injustice would be caused if the consideration stated in Form 14A was irrebuttable and the amount of the taxpayer's capital worth was thereby deemed to be that amount when, for instance, he has raised part if not all of the amount by a loan from a bank;

(5) in this case there was overwhelming evidence adduced by the respondent to justify the Special Commissioners in coming to their decision;

(6) on the facts before the Special Commissioners there was evidence to support their decision and their decision was correct in law.

CASE STATED.

Baharuddin bin Sulaiman (Federal Counsel) for the appellant.

Ting Poi Teck for the respondent.

Ibrahim J.: On July 1, 1972 appellant sent to respondent a Notice of Additional Assessment of $21,670.15 for the year of assessment 1970. That sum was assessed after comparing the capital worth of respondent at the end of 1968 and 1969 as computed by appellant. In 1969 respondent and Puan Tay Hor Tee had bought 14 lots of land which made up Tai Guan Estate. The consideration stated in the prescribed Form 14A which was presented and registered at the Land Office, Melaka under the National Land Code was $126,472.50 and as respondent's share in it was 2/3rd appellant had credited the sum of $84,315 as respondent's undisclosed income for that year. Respondent disputed that amount and appealed to the Special Commissioners.

At the hearing before the Special Commissioners appellant did not call any witness to give evidence but merely relied on the consideration stated in Form 14A which he alleged was irrebuttable. The Special Commissioners decided otherwise and allowed respondent to call several witnesses and produce several documents to establish his contention that he and Puan Tay Hor Tee had bought the 14 lots not at $126,472.50 as stated in Form 14A but at $65,000 and that his 2/3rd share of it was $43,500. The Special Commissioners decided that $43,500 was the actual price paid by respondent and that that amount should be taken into account to compute respondent's capital worth as at December 31, 1969. They accordingly ordered that the Notice of Additional Assessment for the year of assessment 1970 be amended to give effect to their decision. Appellant by notice dated April 24, 1975 required the Special Commissioners to state a case for the opinion of the High Court pursuant to paragraph 34 of Schedule 5 of the Income Tax Act, 1967 and the question of law for the opinion of the High Court is whether on the facts before the Special Commissioners there was evidence to support their decision and whether it was correct in law.